2002

# The State of Utah v. Gerald W. Deitman and Albert D. Lozano : Petition for Rehearing

Utah Supreme Court



David Wilkinson; Kimberly K Hornak; Attorney for Respondent.
Brooke C. Wells; Attorney for Appellant.

IN THE SUPREME COURT OF THE STATE OF UTAH

| | | |
|---|---|---|
| THE STATE OF UTAH, | : | |
| Plaintiff/Respondent, | : | .S9 |
| vs. | : | DOCKET NO. 20584 |
| GERALD W. DEITMAN and ALBERT D. LOZANO, | : | Case No. 20584<br>Category No. 2 |
| Defendants/Appellants. | : | |

PETITION FOR REHEARING

Petition for rehearing of an appeal from convictions of Burglary, a third degree felony, and Theft, a second degree felony, in the Third Judicial District Court, Salt Lake County, State of Utah, the Honorable Homer F. Wilkinson, Judge, presiding.

BROOKE C. WELLS
Salt Lake Legal Defender Assoc.
333 South Second East
Salt Lake City, Utah 84111
Attorney for Appellants

KIMBERLY K. HORNAK
Asst. Attorney General
DAVID WILKINSON
Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114
Attorney for Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

| | | |
|---|---|---|
| THE STATE OF UTAH,<br><br>Plaintiff/Respondent,<br><br>vs.<br><br>GERALD W. DEITMAN and<br>ALBERT D. LOZANO,<br><br>Defendants/Appellants. | : | Case No. 20584<br>Category No. 2 |

PETITION FOR REHEARING

Petition for rehearing of an appeal from convictions of Burglary, a third degree felony, and Theft, a second degree felony, in the Third Judicial District Court, Salt Lake County, State of Utah, the Honorable Homer F. Wilkinson, Judge, presiding.

BROOKE C. WELLS
Salt Lake Legal Defender Assoc.
333 South Second East
Salt Lake City, Utah 84111
Attorney for Appellants

KIMBERLY K. HORNAK
Asst. Attorney General
DAVID WILKINSON
Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114
Attorney for Respondent

TABLE OF CONTENTS

## TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF UTAH

| | | |
|---|---|---|
| THE STATE OF UTAH,<br><br>Plaintiff/Respondent,<br><br>vs.<br><br>GERALD W. DEITMAN and<br>ALBERT D. LOZANO,<br><br>Defendants/Appellants. | : | Case No. 20584<br>Category No. 2 |

## STATEMENT OF THE CASE

This is a petition for rehearing of a decision filed by the Court on May 28, 1987. Originally this case was appealed from convictions imposed for Burglary, a third degree felony, and Theft, a second degree felony, in the Third Judicial District Court, Salt Lake County, State of Utah, the Honorable Homer F. Wilkinson, Judge, presiding.

## STATEMENT OF THE FACTS

The facts are set forth in the Brief of Appellant at pp. 2-4.

## INTRODUCTION

This petition for rehearing is filed pursuant to Rule 35, Utah Rules of Appellate Procedure. In Brown v. Pickard, denying reh'g, 11 P. 512 (Utah 1886), the Utah Supreme Court established the standard for granting a petition for rehearing, stating:

> To justify a rehearing, a strong case must be made. We must be convinced that the court failed to consider some material point in the case, or that it erred in its conclusions....

11 P. at 512. Later, in Cummings v. Nielson, 129 P. 619 (1913) this Court added:

> To make an application for a rehearing is a matter of right, and we have no desire to discourage the practice of filing petitions for rehearings in proper cases. When this court, however, has considered and decided all of the material questions involved in a case, a rehearing should not be applied for, unless we have misconstrued or overlooked some statute or decision which may affect the result, or that we have based the decision on some wrong principle of law, or have either misapplied or overlooked something which materially affects the result.... If there are some reasons, however, such as we have indicated above, or other good reasons, a petition for a rehearing should be promptly filed and, if it is meritorious, its form will in no case be scrutinized by this court.

Cummings v. Nielson, supra at 624. The argument section of this brief will establish that, applying these standards, this petition for rehearing is properly before the Court and should be granted. Indeed, in its opinion of State v. Deitman, 58 Utah Adv. Rep. 24 (1987), ___ P.2d ___, (filed May 28, 1987)(attached as Addendum A), this Court has misconstrued and misapprehended the facts and law.

## SUMMARY OF ARGUMENT

The initial encounter between police and Appellants was a seizure requiring a reasonable suspicion that criminal activity was afoot in order to be justified. Neither the United States Supreme Court nor this Court has established prior to this opinion that police may initiate contact with an individual on a public street absent a showing that they had such a reasonable suspicion. In addition, the facts in the present case establish that even if such a police-citizen encounter were permissible, absent a reasonable suspicion, the officer actually stopped or seized Appellants where

he followed Appellants and attempted to effectuate a stop, then called to Appellants and asked to talk with them, Appellants responded by crossing the street to where the officer stood, the officer asked for identification and then detained Appellants while running a warrants check and asked several investigatory questions. As contended in Appellant's opening brief, the officer lacked a reasonable suspicion to justify such seizure, and the fruits thereof should be suppressed.

## ARGUMENT

### THE INITIAL ENCOUNTER BETWEEN APPELLANTS AND POLICE WAS A SEIZURE REQUIRING A REASONABLE SUSPICION THAT CRIMINAL ACTIVITY WAS AFOOT TO BE JUSTIFIED.

This Court relied on United States v. Merritt, 736 F.2d 223 (5th Cir. 1984), for the proposition, and ultimately the support for its holding, that the facts of the case demonstrated a constitutionally permissible police-citizen encounter. See Addendum A. The decision reads:

> In United States v. Merritt...the Fifth Circuit Court delineated three levels of police encounters with the public which the United States Supreme Court has held are constitutionally permissible:
>
> (1)an officer may approach a citizen at anytime [sic] and pose questions so long as the citizen is not detained against his will; (2) an officer may seize a person if the officer has an "articulable suspicion" that the person has committed or is about to commit a crime; however, the "detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop"; (3)an officer may arrest a suspect if the officer has probable cause to believe an offense has been committed or is being committed.

United States v. Merritt, supra, at 230 (citations omitted). This Court then states, "In this case, the initial encounter by the police with defendants falls into the first category."

However, in citing Merritt and relying on the above quotation, this Court misapprehends the law. In I.N.S. v. Delgado, 466 U.S. 210, 216 (1984), the United States Supreme Court expressly stated that that Court has "yet to rule directly on whether mere questioning of an individual by a police officer, without more, can amount to a seizure under the Fourth Amendment..." The Supreme Court then added that the recent decision in Florida v. Royer, 460 U.S. 491 (1983), implied that requests by police for one's identification would unlikely result in a Fourth Amendment violation. I.N.S. v. Delgado, supra, at 216. However, Florida v. Royer, supra, actually held that officers had illegally detained the defendant at the time of his consent to a search of his luggage thereby tainting the search and rendering ineffective the consent. Florida v. Royer, supra at 507-08.

Moreover, Florida v. Royer is a case which fits into a very narrow factual context and is distinguishable on that basis. Florida v. Royer, supra; United States v. Mendenhall, 446 U.S. 544 (1980); United States v. Place, 462 U.S. 696 (1983); Reid v. Georgia, 448 U.S. 438 (1980); and Florida v. Rodriquez, 469 U.S. 1 (1984); are all cases which draw support for the police-citizen encounter concept in the context of detaining "drug couriers" at airports. These cases are distinguishable from the present case because of the transitory nature of airports, the government's compelling interest in stopping the transportation of drugs, and the use of drug courier profiles in making a decision to approach an individual. The United States Supreme Court has therefore given special consideration and allowances in balancing these special

concerns and interests with those of the Fourth Amendment. See generally United States v. Mendenhall, 446 U.S. at 561 (Powell, J., concurring opinion); and Florida v. Royer, 460 U.S. at 508 (Powell, J., concurring opinion)(facts and circumstances of investigative stops necessarily vary, and the public has compelling interest in identifying by all lawful means those who traffic in illicit drugs).

The rationale for the Royer and Mendenhall line of cases was borrowed from cases involving the violation of immigration laws. This is another area where the exigencies of the circumstances and a compelling governmental interest warrant a limiting of Fourth Amendment protections.

In United States v. Brignoni-Ponce, 422 U.S. 873 (1975), the United States Supreme Court clarified that reasonable suspicion of criminal activity could warrant a temporary seizure for the purpose of questioning, limited, however, to verifying or dispelling the suspicion that the immigration laws were being violated. The Court recognized such violation as "a governmental interest that was sufficient to warrant temporary detention for limited questioning." Royer, supra, at 498-99 (citing Brignoni-Ponce, supra at 881-82). Notably, immigration violations, like drug courier cases, fit within the realm of profiles, target cities, and other exigencies demanding a stretch of the balancing of the interests of society and the individual's Fourth Amendment rights.[1]

---

[1]One additional exception where a temporary detention is satisfied as reasonably based on the exigencies involved is that of detaining the occupant of a house while executing a search warrant. See Michigan v. Summers, 452 U.S. 692 (1981).

Unlike those special, more demanding types of cases, the case at bar contains no special exigencies to demand the same narrowing of the individual's rights against unreasonable search and seizures. Inasmuch as the United States Supreme Court has never directly ruled on the constitutionality of police-citizen encounters as explained in Delgado, and has not implicitly approved such a concept in the context of this case--where police approach a citizen on a public street, the Fifth Circuit's opinion in Merritt is in error to imply that they have.

A review of the facts in Merritt discloses that the cited language there is dictum. In Merritt, the government did not argue that a police-citizen encounter, rather than a seizure, occurred. The government consistently and successfully argued that the investigatory stop was supported by an articuable suspicion that the vessel was engaged in drug trafficking. The Fifth Circuit actually affirmed that the stop was valid under Terry v. Ohio, 392 U.S. 1 (1968) standards. United States v. Merritt, supra, at 230. The cited language was surplusage in Merritt and should not be relied on by this Court in establishing new law in this jurisdiction.

This Court has yet to approve and legitimize the police-citizen encounter theory. Statutorily, there appears to be no room for such a theory. Utah Code Ann. §77-7-15 (1953 as amended) provides:

> §77-7-15. Authority of peace officer to stop and question suspect--Grounds. A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions.

This statutory codification of Terry v. Ohio, supra, requires an officer to have a reasonable suspicion to stop an individual and ask his name, address and an explanation of his actions.

Additionally, case law from this Court has yet to establish that police may approach an individual or otherwise initiate an interaction with an individual absent a reasonable articulable suspicion that the individual is involved in criminal activity. In State v. Whittenback, 621 P.2d 103 (Utah 1980), cited in the opinion, an officer approached defendants in an all-night laundromat at 1:00 a.m. The officer asked the individuals for identification and an explanation of their presence. This Court held that "there was no improper seizure or detention in the questioning." Id. at 105 (emphasis added). There was "no improper seizure" because the officer articulated reasonable, objective facts upon which he based the stop. Those facts were: (1) the officer knew there had been several thefts committed in the area; (2) he observed that the defendants were alone in the laundromat; and (3) from previous encounters with them, he knew they were from out-of-town and that, on the prior occasion, they had been in possession of contraband and a bag full of coins. Id. This Court, therefore, considered the stop a seizure and not a police-citizen encounter.

In State v. Christensen, 676 P.2d 408, 412 (Utah 1984), this Court found that no seizure, detention or investigatory stop occurred and pointed out that "[a]ny person may, of course, direct a question to another in passing" (citations omitted). In Christensen, police officers were investigating an abandoned truck and attached trailer which was obstructing traffic. The defendant

returned to the scene, got out of the vehicle in which he was riding, and approached the officers. The appellant, not the officers, initiated contact. In determining whether a seizure occurred, there is a marked distinction between an individual approaching the officers, and the officers initiating the encounter by following an individual, then asking the individual to answer some questions.

In the present case, officers followed Appellants and initiated the contact with Appellants. Although Appellants walked across the street to the officer's car, they did so in response to a request by the officer. In its brief, the state concedes that the officers initially approached Appellants and posed questions as part of their investigation of the alarm (Respondent's Brief at 8). Although the initial stop of Appellants in this case did not amount to an arrest requiring probable cause, it nevertheless was a temporary detention for investigatory purposes and pursuant to Utah Code Ann. §77-7-15 (1953 as amended), the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Utah Constitution, the officers needed a reasonable articulable suspicion that Appellants had committed a crime to justify the stop and subsequent request for identification.

In State v. Swanigan, 699 P.2d 718 (Utah 1985), an officer stopped two men walking near the scene of a burglary. The officer told the men to stop and asked for identification. A backup officer arrived and the officers phoned in a warrants check. This Court considered this action a "seizure" and held that the officers did

not have a reasonable suspicion based on objective facts to justify the stop.[2]

Even if this Court accepts the concept that police may initiate contact with individuals on a public street absent a reasonable suspicion that they are involved in criminal activity, the facts in this case indicate nevertheless that the initial encounter between the officer and the appellants was a seizure. The initial stop in this case is similar to the actual stop in Swanigan. The only difference is one of semantics-in Swanigan the officer approached the individuals and asked them for identification, then ran a warrants check. In the present case, the officer asked to talk to the appellants; they responded to his request by crossing the street to where he was standing. The officer then asked for identification and ran a warrants check on the pair. The officer's decision to arrest Swanigan based on an outstanding warrant as opposed to the officer's decision not to arrest based on the warrant he found in this case, does not change the nature of the initial detention.

In the present case, the officer spotted Deitman and Lozano near the place where the alarm sounded. He followed their vehicle for approximately two blocks, then attempted to effectuate a stop (T. 40-41). At the time the officer attempted to stop the pair, they were pulling into a driveway, so the officer pulled across the street and waited (T. 41). When the pair got out of their vehicle, the officer called to them and asked to talk with them. They

---

[2]Noteworthy in Swanigan is that the State confessed error and admitted that the evidence was seized pursuant to an unlawful detention. Swanigan, 699 P.2d at 719.

responded to his request by walking to where he was standing (T. 42). The pair gave the officer the identification he requested; the officer then ran a warrants check on them which lasted two to three minutes (T. 42). The officer then asked the pair what they had been doing in the area of the video store where the alarm went off (T. 42-43).

Even if this court chooses to draw a distinction in deciding whether a seizure occurred based on whether the officer approached individuals and asked for identification or called to them and had them approach him in response to his request, detaining individuals to run a warrants check after the initial questioning nevertheless amounts to a seizure. For this Court to hold in this case that a detention to run a warrants check on an individual is not a seizure under the Fourth Amendment or Article I, Section 14 of the Utah Constitution, and is permissible police activity which does not require a reasonable, articulable suspicion of criminal activity, opens the door for significant abuse by police officers. Pursuant to the opinion in this case, officers arguably could initiate an encounter with individuals on no grounds whatsoever, couch their initial statements to those individuals in terms of a request rather than demand, request that the individual walk to them rather than walking over to the individual, then run a warrants check on such individuals and proceed with investigatory questioning where the individuals have done nothing irregular. Surely, where an officer attempts to effectuate a stop, acknowledges that he followed and requested to talk to individuals as part of an investigation, asks those individuals to identify themselves and runs a warrants

check on such individuals, then asks investigatory questions, a "seizure" has occurred and the protections of the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Utah Constitution come into play.

If this Court distinguishes this case from Swanigan and decides against Messrs. Deitman and Lozano, it should resist any temptation to do so on the police-citizen encounter theory. Not only is Merritt bad precedent for establishing the concept that officers may initiate encounters with citizens on less than a reasonable suspicion, but in this case the initial interaction amounted to a seizure. In its brief, while the State does make a one sentence statement that the initial encounter in this case was not a seizure, the State primarily argues that the officers had a reasonable suspicion to stop the Appellants (Brief of Respondent, pp. 7-8).

In this petition for rehearing, Messrs. Deitman and Lozano request that this Court reconsider the police-citizen encounter concept in general and as applied to the facts of this case and refrain from a further narrowing of the individual rights protected under the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Utah Constitution.

## CONCLUSION

Because this Court has misconstrued and misapplied the facts and law in this case, the Appellants respectfully petition

this Court to reconsider its decision in this case and reverse and remand the convictions for either a new trial or dismissal of the charges.

RESPECTFULLY SUBMITTED this 24th day of June, 1987.

Brooke C. Wells

BROOKE C. WELLS
Attorney for Appellants

CERTIFICATION

I, BROOKE C. WELLS, do hereby certify the following:

(1) I am the attorney for appellants/petitioners in this case and;

(2) This Petition for Rehearing is presented to this Court in good faith and not to delay any matter in this case.

Respectfully submitted this 24th day of June, 1987.

Brooke C. Wells

BROOKE C. WELLS
Attorney for Appellants

DELIVERED/MAILED a copy of the foregoing Petition for Rehearing to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114 this ____ day of June, 1987.

# ADDENDUM A

IN THE SUPREME COURT OF THE STATE OF UTAH

----ooOoo----

State of Utah,
Plaintiff and Respondent,

v.

Gerald W. Deitman and
Albert D. Lozano,
Defendants and Appellants.

No. 20584

F I L E D
May 28, 1987

Geoffrey J. Butler, Clerk

---

Third District Court, Salt Lake County
The Honorable Homer F. Wilkinson

Attorneys: David C. Biggs, Brooke C. Wells, Salt Lake City,
for Appellants
Dave Thompson, Earl F. Dorius, Salt Lake City,
for Respondents

---

PER CURIAM:

Defendants appeal from convictions of burglary[1] and theft.[2] They raise as their single issue that the evidence should have been suppressed on the ground that police officers had insufficient probable cause to effectuate a stop. We affirm.

In the early morning hours of March 1, 1984, a burglar alarm sounded at International Video in Salt Lake City. Officers arriving at the scene observed a white pickup truck, with a camper attached, pull away from the curb across the street from the shop. One of the officers followed this truck until it stopped in front of a residence a few blocks away. The officer waited until the occupants, defendants, exited the vehicle. The officer called to defendants and asked if he could speak to them. They responded by crossing the street to his vehicle and presented identification upon request. The officer then asked his dispatcher to check for outstanding warrants against defendants, which revealed an outstanding warrant against Mr. Lozano. However, neither defendant was arrested at this time.

---

1. A third degree felony under Utah Code Ann. § 76-6-202 (1953).
2. A second degree felony under Utah Code Ann. § 76-6-412 (1953).

The officer then returned to the video shop, where other officers had found a broken window and had called the owner of the shop. The owner reported that a two-piece video cassette recorder was missing.

Officers returned to the residence where the white truck was still parked and knocked on the door. Defendants agreed to talk to the officers. Defendant Deitman gave the officers permission to look into the truck but not to enter it. One officer flashed his light into the rear window of the camper and observed "a black rectangular object with what appeared to be a memory switch." Defendants were arrested and the truck was impounded. A search warrant was obtained. The truck was searched, and a VCR and a tuner were discovered in the truck. The VCR had the serial No. 2025H0058. The serial number reported by the owner to be on the missing VCR was No. 202510058. This number was therefore listed on the search warrant.

Defendants contend that the officers had no probable cause for the initial stop and that the trial court erred in denying their pretrial motion, renewed at trial, to suppress the evidence.

In United States v. Merritt, 736 F.2d 223 (5th Cir. 1984), the Fifth Circuit Court delineated three levels of police encounters with the public which the United States Supreme Court has held are constitutionally permissible:

> (1) an officer may approach a citizen at anytime [sic] and pose questions so long as the citizen is not detained against his will; (2) an officer may seize a person if the officer has an "articulable suspicion" that the person has committed or is about to commit a crime; however, the "detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop"; (3) an officer may arrest a suspect if the officer has probable cause to believe an offense has been committed or is being committed.

736 F.2d at 230 (citation omitted).

In this case, the initial encounter by the police with defendants falls into the first category. The officer was justified in asking defendants for identification and an explanation of their presence in an area where police had responded to a burglar alarm. Defendants were not detained against their will and were not arrested at this time. In State v. Wittenback, 621 P.2d 103 (Utah 1980), this Court said:

> Though there may be no probable cause to make an arrest, a police officer may, in appropriate circumstances and in an appropriate manner, approach a person for investigating possible criminal behavior.

621 P.2d at 105.

Defendants rely on State v. Swanigan, 699 P.2d 718 (Utah 1985), and State v. Carpena, 714 P.2d 674 (Utah 1986), but neither case is applicable here. In both Carpena and Swanigan, the defendants were stopped, detained, and searched without their consent. Here, defendants were not stopped by the officer and raised no objection when the officer asked if he could talk to them. They crossed the street, produced identification on request, and were not detained against their will. We hold that the court did not err in refusing to suppress the evidence under these circumstances.

Defendants also argue that the search warrant was defective because the serial number of the VCR contained an incorrect number in place of a letter. However, since defendants admit that this error in the warrant did not render the property seized "inherently unidentifiable as being stolen," State v. Gallegos, 712 P.2d 207 (Utah 1985), we do not discuss the issue.

Affirmed.

---

Howe, Justice, concurs in the result.